

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 12464/2006

DATE: 3/6/2008

NOT REPORTABLE

IN THE MATTER BETWEEN

JONAS LESIBA LEDWABA

PLAINTIFF

AND

NTT TOYOTA GROBLERSDAL

1ST DEFENDANT

OBERT COVANE

2ND DEFENDANT

JUDGMENT

SERITI, J

1. INTRODUCTION

This matter came to Court by way of action.

- 1.1 In the Particulars of Claim the Plaintiff alleges that around July 2004 he delivered his motor vehicle, a Volkswagen Golf bearing registration numbers CHD056 MP to the First Defendant, for the latter to carry out certain repairs on the said motor vehicle.

Plaintiff further alleges that it was a specific, alternatively, an implied term of their verbal agreement that the First Defendant would repair the said motor vehicle and thereafter inform the Plaintiff who would then come and collect the motor vehicle from the premises of the First Defendant.

On 22 July 2004 the First Defendant, contrary to their verbal agreement and without the Plaintiff's consent or authority, after allegedly repairing the motor vehicle, gave same to the Second Defendant for the latter to drive the motor vehicle from Groblersdal where premises of the First Defendant are situated to the Plaintiff at Musina.

On the way to Musina, the Second Defendant, through his negligence, was involved in a motor vehicle collision in which collision the Plaintiff's motor vehicle was damaged, and the Plaintiff's damages came to an amount of R42 843,22.

Plaintiff further alleges that as he did not consent to Second Defendant driving his motor vehicle, the First and Second Defendants are both liable for the damages that he suffered.

- 1.2 In its plea, the First Defendant stated that after completing the repairs on the Plaintiff's motor vehicle, it delivered the motor vehicle in question to Second Defendant and a certain Mr Ndou on specific telephonic instructions of the Plaintiff.

First Defendant further pleaded that the risk of damages to the said motor vehicle, at the time of the collision was on the Plaintiff. First Defendant further pleaded that there is no causal connection between the alleged damages of the Plaintiff and alleged conduct of the First Defendant.

- 1.3 In his plea the Second Defendant admitted that the First Defendant handed the motor vehicle to him but denied that the said motor vehicle was handed to him without authority or consent of the Plaintiff.

He further admitted the occurrence of the accident but denied that same was caused by his negligence but specifically pleaded that the sole cause of the accident was the unidentified driver of the truck who was negligent in certain respects. He further pleaded that it was a specific, alternatively an implied term of the agreement between the First and Second Defendants that the Second Defendant would deliver the Plaintiff's motor vehicle to the Plaintiff and that the Second Defendant will not bear the risk for any damage to the said motor vehicle.

2. EVIDENCE

2.1 As the Plaintiff had a duty to begin, the Plaintiff went into the witness-box to testify.

He testified that he bought a Volkswagen motor vehicle from the First Defendant. During July 2004 the said motor vehicle gave him problems and it required repairs. The said motor was taken to the First Defendant for repairs, and he was given a courtesy motor vehicle to use while his motor vehicle was in for repairs.

Later, he was informed that he should give Mr Steven Ndou the courtesy motor vehicle as Mr Ndou, who also stays at Musina, wanted to go to the premises of the First Defendant. Mr Ndou, after arrangements were made, went to his (witness') home to collect the courtesy motor vehicle. Later during the morning, Mr David Mahloko, a sales representative employed by First Defendant, telephoned him and advised him that the guys have arrived. He then asked Mr Mahloko if his motor vehicle has been repaired and the latter advised him that the motor vehicle is still in the workshop. He telephoned Mr Ndou and asked the latter about the condition of his motor vehicle, and Mr Ndou advised him that his (the witness') motor vehicle is not yet fixed, and he requested Mr Ndou to bring back to him

the courtesy motor vehicle.

In the afternoon he telephoned Mr Mahloko, and the latter advised him that the guys have left, and he has given them the motor vehicle and it has been repaired.

At about 20:00 he spoke to Mr Ndou over the telephone and Mr Ndou advised him that there was an accident. Mr Ndou collected him and took him to the scene of accident where he found that his motor vehicle was involved in a collision with a truck. The truck was standing in the middle of the left lane and his motor vehicle was standing at the right hand rear wheel of the truck. The front right fender of his motor vehicle was touching the rear wheel of the truck. The truck was already on the straight portion of the road. His motor vehicle was damaged on the left fender, left wheel, bumper, radiator and windscreen. Mr Ndou informed him that the Second Defendant was driving the Golf motor vehicle at the time of the accident.

After the accident his motor vehicle was taken to panel beaters. He was later informed that his motor vehicle was damaged beyond economic repairs.

During cross-examination by First Defendant's Counsel, he testified that he spoke over the telephone with Mr Ndou, whilst the latter was at First Defendant's premises and he informed Mr Ndou that he will come and collect his motor vehicle after same is repaired.

When he handed his motor vehicle to Mr David Mahloko, they verbally agreed that after the motor vehicle is repaired, Mr Mahloko will telephone him and he was going to personally come and collect his motor vehicle from the premises of First Defendant.

When he spoke to Mr Mahloko over the telephone, late in the afternoon, Mr Mahloko advised him that "guys have left and I have given them your car".

When Mr Ndou and Second Defendant left the premises of the First Defendant, he did not know who was driving his motor vehicle.

- 2.2 The next witness to testify on behalf of the Plaintiff is Mr Steven Ndou. He testified that on the day in question he drove together with Second Defendant and another friend to the premises of the First Defendant. At the premises of First Defendant he met with Mr Mahloko as he was looking for a motor vehicle to buy.

After finishing his discussions with Mr Mahloko, they had to drive back home. He was going to drive the motor vehicle they came with.

Prior to their leaving the premises of the First Defendant, Mr Mahloko spoke to the Plaintiff over the telephone, and thereafter Mr Mahloko advised him that the Plaintiff wants him (the witness) to bring his motor vehicle back with him. He (the witness) then spoke to the Plaintiff over the telephone and he advised the Plaintiff that his motor vehicle is not yet repaired.

Mr Mahloko wanted him to take the Plaintiff's car back home, he refused to drive it back home as he was going to drive the motor vehicle that they came with. Mr Mahloko then spoke to the Second Defendant and the latter drove the Plaintiff's motor vehicle.

When they left the First Defendant's premises, he drove behind the Second Defendant who was driving the Plaintiff's motor vehicle. Shortly before they reached Musina, he could no longer see the Second Defendant, but on entering Musina he saw that the Second Defendant was involved in a collision with a truck. The truck was on the road and the Golf motor vehicle that the Second Defendant was driving had collided with the truck

from behind.

After seeing the collision, he telephoned the Plaintiff, went to the latter's home to fetch him and brought him to the scene of the accident.

Under cross-examination he testified that over the telephone, Plaintiff told him not to bring his motor vehicle back. He does not know why the Second Defendant was given the Plaintiff's motor vehicle to drive it. Plaintiff closed his case.

2.3 The First Defendant called Mr David Mahloko to testify.

He testified that he is employed by the First Defendant as a sales consultant.

On the day in question, he spoke to the Plaintiff over the telephone three times.

At about 12:00 he spoke to the Plaintiff over the telephone and advised the latter that the latter's motor vehicle has already been repaired.

On their arrival at the First Defendant's premises, Mr Ndou saw the

Plaintiff's motor vehicle and he informed Mr Ndou that the motor vehicle has already been repaired. He again spoke to the Plaintiff over the telephone and Plaintiff agreed that he (the witness) can give one of the three gentlemen the plaintiff's motor vehicle to drive it back. He then gave the keys of the motor vehicle to Mr Ndou. Mr Ndou took the keys of the motor vehicle and gave same to the Second Defendant and they drove away. They left at about 16:00.

Later Plaintiff telephoned him and he advised the Plaintiff that Mr Ndou and others have already left.

Under cross-examination he testified that the relay of the electric window was not fixed as they had ordered a certain part.

During the telephone conversation with the Plaintiff, he told the Plaintiff that he was going to give keys to the Plaintiff's motor vehicle to the Second Defendant.

First Defendant closed its case.

2.4 Second Defendant went into the witness-box to testify.

He testified that the Plaintiff and Mr Ndou were well known to him as they were colleagues.

In July 2004 he went with Mr Ndou to the premises of the First Defendant. They went by motor vehicle which was driven by Mr Ndou.

On their arrival at the premises of the First Defendant, they checked their motor vehicles and he was not interested in any of their motor vehicles. He went across the street with a gentleman they came with and left Mr Ndou at the premises of the First Defendant.

Later Mr Ndou came to call them where they were and said they should now drive back home. On their arrival at the premises of the First Defendant, Mr David Mahloko asked him to take along the Plaintiff's motor vehicle. He drove the Plaintiff's motor vehicle and Mr Ndou was following him.

On arrival at Musina, a certain truck failed to stop at a stop sign and he hit the said truck at the back next to the wheel.

Police officers came to the scene of the accident and took him to the hospital for blood samples. Plaintiff's motor vehicle was damaged on the

bonnet and on the windscreen. When he approached the truck, the latter was already in the road and was slightly straight. After the accident the truck stopped.

The truck swerved in front of him, he swerved and applied brakes but could not avoid the accident.

Under cross-examination he testified that he did not have Plaintiff's consent to drive Plaintiff's motor vehicle, but Mr Mahloko gave him authority to drive Plaintiff's motor vehicle.

Prior to the accident, he was driving at a speed of 80kph. It was put to him that the speed limit at the vicinity of the accident is 60kph, he said that it is possible that he did not see the speed limit in that vicinity.

He further testified that the area where the accident occurred was well lit and he could see properly.

When he first saw the truck, the truck was about fifteen metres away. The truck did not stop before entering the road. The headlights of the truck and his headlights were on. If he had slowed down the accident might not have happened.

At the time of the collision there was no traffic coming from the opposite direction. If he had passed the truck on the right side, he could have avoided the accident.

He again testified that if he had slowed down, he might have avoided the accident.

3. FINDINGS

During oral argument the First Defendant's Counsel, correctly so, conceded that the Plaintiff was a good witness and that Mr Mahloko was not a good witness.

The Plaintiff testified that he did not authorise Mr Mahloko to give his motor vehicle to anybody to drive.

Mr Ndou and the Second Defendant testified that Mr Mahloko gave the motor vehicle keys to the Second Defendant and not to Mr Ndou as testified by Mr Mahloko.

Mr Mahloko in chief testified that when he gave the motor vehicle keys to Mr Ndou the motor vehicle was repaired but under cross-examination he testified that the relay of the electric window was not fixed as they had ordered a certain

part.

The Court cannot rely on the evidence of Mr Mahloko in so far as it is inconsistent with the evidence of the Plaintiff and Messrs Ndou and Covane.

My view is that Mr David Mahloko gave the Plaintiff's motor vehicle to Mr Covane without the consent or authority of the Plaintiff. Mr Mahloko failed to honour the agreement he entered into with the Plaintiff.

Prior to the accident, Mr Covane first saw the truck when the truck was fifteen metres away from him. There is no explanation why he could not have seen the truck much earlier as the headlights of his motor vehicle and the truck were on. The only reasonable inference that can be drawn is that Mr Covane did not keep a proper look-out.

Furthermore, Mr Covane drove, shortly before the accident, at a speed of 80kph in a 60kph speed zone. If he had driven slower, as he testified, he could have avoided the accident.

My view is that the accident was occasioned by some level of negligence on the part of Mr Covane.

It is not necessary for me to determine the exact level of negligence of Mr Covane. Once the Plaintiff succeeds to prove some negligence on the part of the Second Defendant, the Plaintiff is entitled to his full damages.

The Court was advised by the Plaintiff's Counsel that *quantum* was agreed upon in the amount of R46 512,00.

The First and Second Defendants are both liable for the damages suffered by the Plaintiff.

The *quantum* involved in this case falls within the jurisdiction of the Magistrate's Court. The action could have been instituted in the Magistrate's Court and therefore the Plaintiff should be awarded the Magistrate's Court costs.

The facts of the case are such that it is not unreasonable for the Plaintiff to have engaged the services of Counsel.

The Court therefore makes the following order:

1. First and Second Defendants, jointly and severally, the one paying the other to be absolved, should pay the Plaintiff an amount of R46 512,00.
2. First and Second Defendants are to pay the costs of the Plaintiff on same terms as mentioned in 1 above, which costs will be on an appropriate

Magistrate's Court scale and will include Counsel's costs.

W L SERITI
JUDGE OF THE HIGH COURT

12464-2006

HEARD ON: 16 MAY 2008

PLAINTIFF'S COUNSEL: R A FODEN

INSTRUCTED BY: MOLEMA MAMPURU INC

FIRST DEFENDANT'S COUNSEL: A VAN DER WESTHUIZEN

INSTRUCTED BY: HERMAN GROBLER ATTORNEYS

SECOND DEFENDANT'S COUNSEL: C MYBURGH

INSTRUCTED BY: ERWEE ATTORNEYS